In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-397

SUSAN GARFINKLE et vir.
Appellants,

vs.

SUPERIOR COURT OF CONTRA COSTA COUNTY,
(WELLS FARGO BANK, et al., Real Parties in Interest),
Appellees.

On Appeal from the Supreme Court of the State of California

Motion to Affirm or Dismiss

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

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I.
INTRODUCTION

The decision of the Supreme Court of the State of California is that power of sale foreclosure on deeds of trust in California does not involve state action within the context of the Fourteenth Amendment.[1]

1. Appellants' Jurisdictional Statement states as fact many matters which are neither true nor relevant. We do not further divert attention from the constitutional issue by discussing them.

The decision is so clearly correct that, without further briefing or argument, it ought to be affirmed, or the appeal should be dismissed for want of a substantial federal question.

Accordingly, we move under Rule 16 of the Rules of this Court to affirm the decision of the Supreme Court of the State of California, or to dismiss the appeal for want of a substantial federal question.

II.
ARGUMENT

A. In California Powers of Sale Derive from Private Contract.[2]

Powers of sale, like other powers coupled with an interest, came into use in California as creations of agreement recognized as valid at common law, long ago, *Koch v. Briggs,* 14 Cal. 256 (1859), Restatement of Agency 2d, Section 138.

That fact is evident from the language of the very legislation with which this appeal is concerned, which commences with the words:

> "Where . . . in any transfer in trust made after July 27, 1917 . . . a power of sale is conferred upon the . . . trustee . . . to be exercised after a breach of the obligation for which such . . . transfer is a security . . . ." California Civil Code Section 2924.

B. The "Pervasive Involvement" of the State of California in Power of Sale Foreclosure is to Codify and Restrict, Rather Than to Authorize or Encourage, Its Use.

California Civil Code, Section 2924, was amended in 1917 to require recordation of Notice of Default and Election to Sell, the lapse of three months during which default could be cured, notice of time and place of sale, and certain sale procedures, all

2. The origins of use of powers of sale in agreements creating security interests in real property in California are reviewed at length in an article by Messrs. Burke and Reber entitled: *State Action, Congressional Power and Creditors' Rights: an Essay on the Fourteenth Amendment,* No. 47, Vol. 2 Southern California L. Rev. 1.

as conditions to the exercise of power of sale given in trust deeds. 1917 Cal.Stats. Ch. 204.

The California Legislature thereby did two things. It codified California common law and it curtailed the rights previously enjoyed by creditors under California common law. For these two propositions for which stands the decision of the California Supreme Court with which this appeal is concerned, the decision of the California Supreme Court is conclusive, since both propositions are pure questions of California law.

C. "Legislative Involvement" by Codification and Curtailment of Common Law Rights Created by Agreement Does Not Cause Those Rights or Their Exercise to Constitute State Action to Which the Fourteenth Amendment Is Applicable.

Apart from California decisions such as in this case, in *Connolly Development, Inc. v. Superior Court,* 17 Cal.3d 803, 553 P.2d 637 (1976) and in *Kruger v. Wells Fargo Bank,* 11 Cal.3d 352, 521 P.2d 441 (1974), there are numerous Federal decisions in support of the proposition that codification and curtailment of common law rights do not remove those rights, nor their exercise from the private sector. *Flagg Brothers, Inc. v. Brooks,* 98 S.Ct. 1729 (May 15, 1978); *Melara v. Kennedy,* 541 F.2d 802, 806 (9th Cir. 1976); *Northrip v. Federal National Mortgage Ass'n,* 527 F.2d 23 (6th Cir. 1975); *Adams v. Southern California First National Bank,* 492 F.2d 324 (9th Cir. 1973), cert. denied, 419 U.S. 1006 (1974); *Bond v. Dentzer,* 494 F.2d 302, 311-312, (2d. Cir. 1974), cert. denied, 95 S.Ct. 65 (1974).

More specifically it has been held repeatedly that codification and curtailment of power of sale rights created by trust deed agreements do not cause such rights or their exercise to constitute State action to which the Fourteenth Amendment is applicable.

ARIZONA: *Kenly v. Miracle Properties,* 412 F.Supp. 1072 (D. Ariz. 1976) (found no state action)

CALIFORNIA:

Lawson v. Smith, 402 F.Supp. 851 (N.D. Cal. 1975) (found no state action)

U.S. Hertz, Inc. v. Niobrara Farms, 41 Cal. App.3d 68, 116 Cal. Rptr. 44 (1974) (found no state action)

Strutt v. Ontario Savings & Loan Ass'n., 11 Cal.App.3d 547, 90 Cal. Rptr. 69 (1970) (found no state action)

Lancaster Security Inv. Corp. v. Kessler, 159 Cal.App.2d 649, 324 P.2d 634 (1958) (found no state action)

Davidow v. Corporation of America, 16 Cal. App.2d 6, 60 P.2d 132 (1936) (found no state action)

Davidow v. Lachman Bros. Investment Co., 76 F.2d 186 (9th Cir. 1935) (found no state action)

DISTRICT OF COLUMBIA:

Bryant v. Jefferson Federal Savings & Loan Ass'n, 509 F.2d 511 (D.C. Cir. 1974) (found no state action and waiver)

Young v. Ridley, 309 F.Supp. 1308 (D.D.C. 1970) (found no state action)

GEORGIA:

Coffey Enterprises Realty v. Holmes, 233 Ga. 937, 213 S.E.2d 882 (1975) (found no state action)

Global Industries v. Harris, 376 F.Supp. 1379 (N.D. Ga. 1974) (found no state action)

National Community Builders, Inc. v. Citizens & Southern National Bank, 232 Ga. 594, 207 S.E.2d 510 (1974) (found no state action)

Ruff v. Lee, 230 Ga. 426, 197 S.E.2d 376 (1933) (due process not violated; implied finding of no state action)

Southern Mutual Investment Corp. v. Thornton, 131 Ga. App. 765, 206 S.E.2d 846 (1974) (found no state action)

GUAM:

Y Aleman Corporation v. Chase Manhattan Bank, 414 F.Supp. 93 (D. Guam) (found no state action)

HAWAII:

Maile v. Carter, 17 Hawaii 49 (1905) (no state action or waiver)

IDAHO:

Roos v. Belcher, 79 Idaho 473, 321 P.2d 210 (1958) (found notice sufficient)

MICHIGAN:

Northrip v. Federal National Mortgage Ass'n., 527 F.2d 23 (6th Cir. 1975) (found no state action)

Cramer v. Metropolitan Savings & Loan Ass'n., 401 Mich. 252, 258 N.W.2d 20 (1977) (found no state action)

National Airport Corporation v. Wayne Bank, 73 Mich. App. 572, 252 N.W.2d 519 (1977) (found consent and no state action)

MISSOURI:

Federal National Mortgage Ass'n. v. Scott, 548 S.W.2d 545 (1977) (found no state action)

Federal National Mortgage Ass'n. v. Howlett, 521 S.W.2d 428 (1975), rehearing denied, 423 U.S. 1026 (1975) (found no state action)

MONTANA:

Great Falls Nat'l Bank v. McCormick, 152 Mt. 319, 448 P.2d 991 (1968) (found notice sufficient, state action not discussed)

NEVADA:

Charmicor v. Deaner, 572 F.2d 694 (9th Cir. 1978) (found no state action)

NORTH CAROLINA:

Britt v. Britt, 26 N.C. App. 132, 215 S.E.2d 172 (1975). Appeal dismissed for lack of substantial constitutional question, 288 N.C. 238, 217 S.E.2d 678 (1975) (found notice sufficient, state action not discussed)

NORTH DAKOTA:

Robinson v. McKinney, 4 Dak. 290, 29 N.W. 658 (1886) (found notice sufficient and waiver, state action discussed)

TEXAS:

Armenta v. Nussbaum, 519 S.W.2d 673 (1975) (found no state action)

Barrera v. Security Bld. & Investment Corp., 519 F.2d 1166 (5th Cir. 1975) (found no state action)

Leisure Estates of America, Inc. v. Carmel Development Co., 371 F.Supp. 556 (S.D. Tex. 1974) (found no state action)

VIRGINIA: *Levine v. Stein*, 560 F.2d 1175 (4th Cir. 1977) (found no state action)

WASHINGTON: *Kennebec, Inc. v. Bank of the West*, 88 Wash.2d 718, 565 P.2d 812 (1977) (found no state action)

The very question has received the attention of this Court, recently,* twice.

In *Howlett v. Federal National Mortgage Association*, 423 U.S. 909 (1975), rehearing denied 423 U.S. 1026 (1975), appeal from a decision of the Supreme Court of Missouri, which concluded that state action was not present in power of sale foreclosure, codified in statutes not significantly different from those of California, was dismissed by this Court for want of a substantial federal question.

In *Levine v. Stein*, 434 U.S. 1046 (1978) this Court declined to review on Writ of Certiorari the decision of the Fourth Circuit in 560 F.2d 1175 holding that foreclosure by power of sale of trust deeds which were codified by Virginia statute did not involve state action to which the Fourteenth Amendment was applicable.

In footnote 8 on page 22 of Appellants' Jurisdiction Statement are cited several recent cases as holding power of sale foreclosure unconstitutional.

They are not in point, or concern materially different legislation, or have been reversed.

(1) *United States v. White*, 429 F.Supp. 1245 (N.D. Miss. 1977) and *Ricker v. United States*, 417 F.Supp. 133 (N.D.Me. 1976) are cases in which the *Federal Government* itself was the foreclosing party.

*In 1959 this Court dismissed an appeal and denied certiorari in *Lancaster Security Investment Corp. v. Kessler*, 358 U.S. 306, in which the precise question now before the Court was presented.

(2) *Turner v. Blackburn*, 389 F.Supp. 1250 (W.D.N.C. 1975) held North Carolina's power of sale foreclosure statute not constitutional. The California Supreme Court in its opinion, page 15, expressed its agreement with the decision of the District Court in *Lawson v. Smith*, 402 F.Supp. 85 (N.D. Cal. 1975) that under the North Carolina statutory scheme, the Clerk of the Superior Court had duties which were discretionary (they are indeed *judicial*) not merely ministerial, and the statutory scheme was, therefore, significantly unlike the California statutory scheme. It should be observed, moreover, that in *Britt v. Britt*, 26 N.C.App. 132, 215 S.E.2d 172 (1975) the North Carolina Court of Appeals refused to follow *Turner v. Blackburn*, and North Carolina's Supreme Court denied certiorari for want of a substantial constitutional question, at 217 S.E.2d 678.

(3) In *Garner v. Tri-State Development Co.*, 382 F.Supp. 377 (E.D. Mich. 1974) and in *Northrip v. Federal National Mortgage Ass'n.*, 372 F.Supp. 594 (E.D. Mich. 1974), two district judges of the Federal District Court found Michigan so involved in power of sale foreclosures as to cause such foreclosure to constitute state action.

The 6th Circuit reversed *Northrip* (but not on "other grounds" as Appellants state), concluding that state action was absent, at 527 F.2d 23 (1975).

The Michigan courts have followed the 6th Circuit: *Cramer v. Metropolitan Savings & Loan Association*, 401 Mich. 252, 258 N.W.2d 20 (1977); *National Airport Corporation v. Wayne Bank*, 73 Mich. App. 572, 252 N.W.2d 519 (1977).

D. Flagg Brothers, Inc. v. Brooks.

Appellants urge upon this Court, as they did upon the Supreme Court of the State of California,[3] the argument that this Court's

3. Appellants' request that this Court remand this case to the California Supreme Court for reconsideration in light of *Flagg Brothers, Inc. v. Brooks* ignores the fact that the California Supreme Court considered the significance of *Flagg Brothers* when it denied Appellants' Petition for Rehearing.

decision in *Flagg Brothers, Inc. v. Brooks,* 98 S.Ct. 1729 (May 15, 1978) supports the conclusion that power of sale foreclosure involves state action.

In *Flagg Brothers,* this Court found no state action in private foreclosure sale of property stored by a warehouseman having a possessory lien.

The holding in *Flagg Brothers* is in emphatic accord with the decision at hand. In *Flagg Brothers* the Court said:

> "Thus the only issue presented by this case is whether Flagg Brothers' action may fairly be attributed to the State of New York." (*Flagg Brothers, supra,* at 1734.)
>
> "This system of rights and remedies, recognizing the traditional place of private arrangements in ordering relationships in the commercial world, can hardly be said to have delegated to Flagg Brothers an exclusive prerogative of the sovereign.
>
> "Whatever the particular remedies available under New York law, we do not consider a more detailed description of them necessary to our conclusion that the *settlement of disputes between debtors and creditors is not traditionally an exclusive public function.* Cf. *United States v. Kras,* 409 U.S. 434, 445-446 (1973). Creditors and debtors have had available to them historically a far wider number of choices than has one who would be an elected public official, or a member of Jehovah's Witnesses who wished to distribute literature in Chickasaw, Ala., at the time *Marsh* was decided. Our analysis requires no parsing of the difference between various commercial liens and other remedies to support the conclusion that this entire field of activity is outside the scope of *Terry* and *Marsh.* This is true whether these commercial rights and remedies are created by statute or decisional law. To rely upon the historical antecedents of a particular practice would result in the constitutional condemnation in one State of a remedy found perfectly permissible in another. Compare *Cox Bakeries v. Timm Moving & Storage,* 554 F.2d 356, 358-359 (1977), with *Melara, supra,* at 805-806, and n. 7. Cf. *Bell v. Maryland,* 378 U.S. 226, 334-335 (1964) (Black J., dissenting).

> *"Thus, even if we were inclined to extend the sovereign function doctrine outside of its present carefully confined bounds, the field of private commercial transactions would be a particularly inappropriate area into which to expand it.* We conclude that our sovereign function cases do not support a finding of state action here." (Emphasis added; footnotes omitted. *Flagg Brothers, supra,* at 1735-1737)
>
> "This Court, however, has never held that a State's mere acquiescence in a private action converts that action into that of the State." (*Flagg Brothers, supra,* at 1737)

California's Supreme Court might have said these things in deciding this case. It might have further quoted from *Flagg Brothers,* saying of this case:

> "If [California] had no commercial statutes at all, its courts would still be faced with the decision whether to prohibit or permit the sort of sale threatened here. . . . If the mere denial of judicial relief is considered sufficient encouragement to make the State responsible for those private acts, all private deprivations of property would be converted into public acts whenever the State, for whatever reason, denies relief sought by the putative property owner."
>
> "Not only is this notion completely contrary to that 'essential dichotomy,' . . . between public and private acts, but it has been previously rejected by [the United States Supreme] Court . . . ."
>
> "Here, the State of [California] has not compelled the sale . . ., but has merely announced the circumstances under which its courts will not interfere with a private sale. Indeed, the crux of [Appellants'] complaint is not that the State *has* acted, but that it has *refused to act.*" (*Flagg Brothers, supra,* at 1738.)

Should this court hold not constitutional the legislation in California concerning power of sale foreclosures, the result would deprive debtors of safeguards and rights provided by that legislation, rather than outlaw power of sale foreclosures.

III.

CONCLUSION

Since it is apparent from numerous and recent decisions of this Court, that no state action exists in power of sale foreclosure of trust deeds in California, and that the California legislation limiting use of power of sale foreclosure is not unconstitutional, the decision below should be affirmed, or the Appeal should be dismissed for want of a substantial federal question.

Respectfully submitted,

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October 5, 1978

CERTIFICATE OF SERVICE

DAVID W. LENNIHAN states that he is a member of the Bar of this Court; that on October 5, 1978, he deposited in the mail at San Francisco, California, five (5) sealed envelopes, with postage fully prepaid thereon, containing three (3) copies of the foregoing Motion to Affirm or Dismiss, addressed as follows:

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